where parties are putting in "evidence"; it applies equally where the "evidence" is all in. It covers the topic of argument, of legal reasoning; and equally of reasoning about law and about fact; while the law of evidence relates merely to matter of fact offered to a judicial tribunal as the basis of inference to another matter of fact. To undertake to crowd within the limits proper to the law of evidence the considerations necessary for the determination of matters of a far wider scope, like those questions of logic and general experience and substantive law involved in the subjects of Presumption and Judicial Notice,[1] and that compound of considerations of the same character, coupled with others relating to the history and technicalities of pleading and mere forensic procedure, which lie at the bottom of what is called by this name of the "Burden of Proof," — to attempt this is to burst the sides of the smaller subject and to bring obscurity over the whole of it. And, moreover, it is to condemn this topic, so important in the daily conduct of legal affairs, and so much needing a clear exposition, to a continuance of that neglect, and that slight and merely incidental treatment which it has so long suffered.

James B. Thayer.

CAMBRIDGE, May, 1890.

ELEVATED ROAD LITIGATION.

THE case of Story *v.* N. Y. Elevated R. R. Co., 90 N. Y. 122, presented to the court of last resort in the State of New York a problem in the decision of which was involved a larger amount of property rights than ever came before an American tribunal, unless, perhaps, in the telephone cases. And the case also teemed with as many interesting, important, and varied legal questions as any one case could present. It was *sui generis* and novel in the matters in controversy. It was twice argued by the flower of the New York bar. It considered and laid down what are the rights in the highways that abutters on public streets possess. It determined what is and what is not a legitimate and

[1] 3 Harv. Law Rev. 141; ib. 285.

ordinary use of the public highways. It passed upon grave questions of the right of the legislative power to delegate to corporations the right of acquiring property by eminent domain. And, owing to the unusual circumstances under which the elevated roads in New York City were constructed and put into operation, there followed from the decision as a necessary consequence some of the prettiest questions as to the measure of damages and as to the possessor of those damages that a court is often called to pass upon.

The action was brought to restrain the defendant from the construction of an elevated railroad in front of the plaintiff's warehouses on Front street in New York City. It was found by the court below that the railroad would obscure to a limited extent the light in the plaintiff's building, and render the same flickering and less useful for business purposes, and would tend to depreciate the usefulness and value of the premises. But it was also found that the acts of the defendants were authorized by the Mayor and Commonalty of the city of New York, and were lawful.[1]

In the Court of Appeals the judgment was reversed and an injunction decreed against the defendant, not to issue, however, until it had a reasonable opportunity to acquire the plaintiff's property by condemnation proceedings. What was the property which the court found the plaintiff had that the defendant would appropriate, and on what ground did the court find the plaintiff to possess such property? It was proven that the land where the plaintiff's building was, had originally belonged to the city of New York, and had been conveyed by the city to Mr. Story's predecessor in title in 1773. The court did not decide whether or not the language in the deed conveyed the fee to the centre of the street. But they determined that whether the plaintiff owned the fee or not, yet there was a covenant created by the language of the deed that the street should be forever mantained as a public street. The deed contained a covenant on the part of grantees to build and erect at their own expense certain streets, and among others the one in question, "which said several streets shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for, the inhabitants of the said city, and all others passing and returning through or by the same,

[1] See case below, reported in 3 Abbot's N. C. 78.

in like manner as the other streets of the same city now are, or lawfully ought to be."

Having come to the conclusion that there was this covenant on the part of the city, they had next to determine whether the proposed elevated railroad and the operation of trains thereon was a usage of the street contrary to this covenant, or whether it was a use which the municipality could lawfully appropriate public streets for, from which usage any damages the plaintiff might suffer were but incidental damages such as property owners often suffer without entitling them to legal relief. They came to the conclusion that an elevated structure such as the one proposed was not a usage of the street which could be granted without making compensation.

There were two lines of their own decisions before them when the Story case was determined which, if not inconsistent, at least presented a sharp divergence as to what changes in the use of a street took away property from an abutter so as to entitle him to compensation.

On the one side were their own decisions in the surface railroad cases holding a street railway a legitimate street use;[1] on the other side were their decisions that such easements as the defendant sought to appropriate were property.[2]

The decision was rendered by a vote of four to three. The opinions of Danforth and Tracy, JJ., held in effect that light, air, and access to one's property from the street on which it abuts were property, and property that had been paid for presumably when the abutter purchased his property, and that because this court had held that a street surface railway was a legitimate use of the street, it was no way inconsistent to hold that a radically differently operated railway was not an ordinary and legitimate street use. The opinion of Earl, J., for the minority was in substance that an elevated railroad duly authorized for the necessities of the people of the city of New York was just as much a use of the street that was now proper as was a street surface railway at the time the prior decisions were rendered, and that an elevated railroad could not be held an unlawful street use without overruling their own prior decision in the surface railway cases.

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[1] People *v.* Kerr, 27 N.Y. 188; Kellinger *v.* Forty-second Street Railway, 50 N.Y. 206.

[2] Arnold *v.* Hudson River Railroad Company, 55 N. Y. 661; Doyle *v.* Lord, 64 N. Y. 432.

It would be perhaps presumptuous in the writer to enter into any discussion as to which opinion was correct law, after the able presentation of each question by the respective advocates and judges. But I think every one must admit that the conclusion reached by the majority of the court was consonant with every natural sense of justice. No one can really suppose that such an appropriation of the streets as was made in 53d street or Pearl street, New York City, was ever contemplated or dreamed of by either the municipality or the abutting property owners when these streets were laid out. And whatever view may be held as to the effect of the elevated railroads on value in some streets in New York City, on these streets there can be no question a serious injury was done to property by the construction of elevated railroads. Nor does the court seem to have violated the principle of *stare decisis* in reaching the conclusions it did. Tracy, J., very satisfactorily says, "The fact that a particular structure is found to be consistent with the uses of a street is no evidence that a different structure is not inconsistent with such uses." There is no similarity between a surface horse railway and an elevated road. And it would indeed have been a startling suggestion if the court had held that any use of a public street which might be convenient for the use of the people of the city could legally be authorized by the Legislature. To the writer it has always seemed that the decision in Story *v.* N. Y. Elevated Railroad Company was a most desirable conclusion — all the more worthy of praise because of the clamor with which the argument was pressed of the great benefit conferred upon the city of New York by these elevated roads.

The decision in the Story case, carefully considered as it was, and clear and satisfactory as it would seem to be in the principle it laid down, was not to be permitted to stand without a desperate attempt to reconsider and overrule it, or at least to limit its effect within a very narrow compass. It remained for the court in the case of Lahr *v.* Metropolitan, 104 N. Y. 268, to reiterate the doctrine of the Story case in even more decided language. In this second case it was argued by the defendant that the doctrine of the Story case only applied to cases where there existed the peculiar covenant in the deed. And had this view prevailed it would have resulted in putting an end to the great mass of the elevated litigation. A large proportion of the territory over which

the elevated roads of the city extend is in streets where a qualified fee of the street is conferred or vested in the city without any specific covenant in a conveyance from the city as in the Story case. The language of the Act of 1813, under which most of the streets in the city were opened and laid out, is as follows: "In trust, nevertheless, that the same be appropriated and kept open for a part of a public street . . . forever in like manner as the other public streets . . . in the said city are and of right ought to be." But in the Lahr case the court, after assuming as their rule of conduct the principle of the Story decision, said that wherever the opinion in the Story case led they felt bound to go, and held that under these street-opening acts there was just as definite a trust created on the part of the city as in the case of a covenant like that in the Story case, and that the abutting owners being liable to assessment for street purposes it would be little short of "legalized robbery" if these benefits could at the next moment be taken from them.

There remained still one more resource for the elevated railroad companies to deny their liability. There were a few streets on the line of their road, where there was not a covenant from the city, as in the Story case, nor were they opened under the act of 1813, as in the Lahr case. (Pearl street and the Bowery are examples.) It has always been contended that in these "Dutch brief" cases at least there is no liability to the property owner.

The argument to support this contention is based upon the theory that these streets were originally Dutch highways, and subject to Dutch law; that by the law of the Dutch the municipality owned the fee of the streets subject to no trust in favor of the abutting property owners; and that when the English succeeded to the control of Manhattan Island in these streets the rule of the Dutch law prevailed. The case of Dunham *v.* Williams[1] is the chief case relied upon as an authority for this position. That was a case holding that where a highway was laid out prior to the capitulation of the Dutch, the title of the government to it became absolute, as that was the rule of the civil law, and the Dutch made it a condition of their surrender that they should remain in the enjoyment of their own customs as to inheritance.

The argument has been repudiated by the Supreme Court of New York, by the Superior Court of the City of New York, and

[1] 37 N. Y. 251.

by the Court of Common Pleas for the City and County of New York.[1] All these courts have interpreted the Lahr case as laying down the broad doctrine that every abutter on a public street as such is possessed of certain easements in the street, which are property which cannot be taken from him without compensation. But the leading case on the Dutch brief question is that of Abendroth *v.* N. Y. Elev., reported in 54 Superior, 417, and now argued, but not, at the time of writing, decided by the Court of Appeals. There would seem, however, to be little doubt that the case will be affirmed, and the Dutch brief question determined against the railroad companies by our Court of Last Resort. The whole theory of these elevated road cases as hitherto expounded by that court has been that abutters on public streets have, *as such abutters*, certain property in the streets which they cannot be deprived of without compensation. This property has been deduced from their liability to be assessed for street openings and improvements (see language of Ruger, C. J., in Lahr case, *ubi supra*). That liability is just as coextensive on Pearl street as on any other street in New York City. And whoever may own the fee of the streets and whatever law may have prevailed there, yet while they do exist as public streets, it would be an artificial and illogical position to interpret the right of property owners upon them as differing from those on any other street in the city. It is to be expected that the decision of the Court of Appeals in the Abendroth case will settle forever the rule that every abutter on any public street has property rights in the streets of which he cannot be deprived without compensation.

We have been considering hitherto what rights of property have been found to exist in abutters on public streets; a no less mooted question has been in many cases to whom that property belongs. The elevated roads were built and put in operation throughout the city in the years 1876 to 1879. It was not until 1882 that the Story case finally fixed a liability upon the companies. Meanwhile much property abutting on the line had been transferred, the grantors in some cases reserving "all causes of action whether in law or in equity against the elevated railroads for loss of rents or depreciation of value of the property," but commonly conveying without any reservation.

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[1] See Hine *v.* N. Y. Elev., 27 N. Y. St. R. 303; Mortimer *v.* N. Y. Elev., 25 N. Y. St. R. 872; and Kane *v.* N. Y. Elev. R. R., 6 N. Y. Weekly Supplement, 526.

Let us consider first the ordinary case where real estate is transferred without any reservation. Every layman and many of the bar, not familiar with the course of this litigation, have asserted that the damages belong to the person who owned at the time the roads were built. His grantee purchased the property at a reduced price from the very fact of the road being there, and it has been argued with much apparent plausibility by the railroads that the seller is entitled to the damages. There is a great deal of abstract justice in this argument, but the law has been interpreted otherwise, — Glover *v.* Manhattan,[1] where Ingraham, J., says: "It can make no difference at what time he became the owner of the property, but he is entitled to be protected against an unauthorized appropriation, whether it was acquired by him before the defendants appropriated it, or the day before the commencement of the action."

The writer has always thought a different rule would have been much more in harmony with justice. Yet the decision in New York State could not have been otherwise without unsettling the law of realty, and doing much more injury by making poor law to meet an exceptional hardship. In many States these roads would have been held to have committed a permanent trespass, and the cause of action to have accrued when they were built. But in New York the whole tendency is to regard such trespasses as continuing, every day constituting a new trespass and a new cause of action.[2]

It is partly on this ground that the defence of laches has been so continually overruled by the courts in the equity action.

In a suit at law a property owner cannot recover the permanent damage to his property. He can only recover the damages that have accrued for the six years of trespasses prior to instituting the action, provided he has owned the property for six years.[3] The practical way in which property owners have obtained full damages past, present, and future has been by maintaining an action in equity to enjoin the operating of the road. Another reason why a court of equity will take jurisdiction is to avoid a multiplicity of suits. The courts decree an injunction and award the property owner *as incidental relief* the rental damage that he has

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[1] 51 Superior Ct. 1.

[2] Uline *v.* N. Y. Cent. R. R. Co., 101 N. Y. 98; Pond *v.* Met. Elev. Ry. Co., 112 N. Y. 186.

[3] Pond *v.* Metropolitan, *supra.*

suffered to the date of the trial accruing within six years prior to the commencement of the action. But an optional clause is invariably inserted in the decree of injunction somewhat in this form: —

> That upon tender to plaintiff within thirty days from the date of this judgment of the sum of $10,000 for the easements in South Fifth Avenue, appurtenant to the premises described in the complaint, plaintiff deliver or cause to be delivered to the defendant a conveyance and release from himself conveying and releasing to the defendant the right to use the street for the defendant's present structure and the operation of defendant's railroad as at present operated and maintained, and in the event that said money is so tendered to the plaintiff no injunction shall issue herein.

In this neat method a court of equity has been able to dispose of the whole litigation at once, and as matter of fact to award full damage. But this alternative clause has always been regarded as a favor to the defendants to enable them to avoid the injunction. Should they see fit to submit to the injunction they could do so. [1]

Hence, when property is conveyed absolutely, the purchaser taking all the right attaching to property is not to be prevented from enforcing his rights simply because he paid no more than the property was worth with the road there. The seller having parted with the fee, of course cannot enjoin trespasses on property he has ceased to own, and as the Pond case shuts him out from maintaining an action at law to recover the permanent damage, he can only recover for the trespasses during his ownership accruing within six years prior to the commencement of his law action.

Although the law is not quite so definitely settled in the first case where he has reserved all cause of action the same rule doubtless will prevail. One cannot reserve a cause of action to accrue in the future. And a reservation of the easements would be in derogation of his deed, as they are of no value detached from the land to which they are incident. So that practically such a reservation is of no avail to benefit the seller.

We pass now to the question of damages. In the Lahr case [2] the court said: —

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[1] Eno *v.* Metropolitan, 56 Superior, 313.

[2] 104 N. Y. 268.

The structure here and the intended use cannot be separated and dissected, and it must be regarded in its entirety in considering the effect which it produces upon the property of the abutter.

However the damages may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass rendering the wrong-doer liable for the consequences of his acts.

The Drucker case [1] illustrated the application of this rule: —

Smoke and gases, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The drippings of oil and water, and possibly the frequent columns, interfere with convenience of access. These are elements of damage even though the necessary concomitants of the construction and operation of the road and not the product of negligence, for they abridge the land-owners' easements and to that extent, at least, are subjects for redress in an action for damages.

Whether noise from the operation of the road is a proper element of damage is still a question not passed upon definitely by the Court of Appeals. In Taylor *v.* Met. [2] and in Kane *v.* Metropolitan [3] noise has been held a proper element of damage.

The argument against recovery for noise is that an abutting owner has no easement of quiet in the street. The argument in favor of allowing it has been the language in the Lahr opinion and the general argument that such a noise is not an ordinary street use. Similarly, whether "loss of privacy" is an element of damage is still an open question. It is argued on the one side that a property owner certainly has no easement of seclusion on the street, or, as one eminent counsel for the road expressed it, persons might walk on tall stilts past one's premises, yet they would not be held liable; on the other side it is argued that any use of a street which exposes the occupants of property to unusual gaze and inspection from the public is not an ordinary street use, and hence is a use to which the street cannot be subjected without compensation.

We pass now to the question as to whom the past damages belong in the case of a leased estate. As we have seen, at law a property owner can recover the damages for the past trespasses committed within six years prior to the commencement of the

[1] 106 N. Y. 157.
[2] 55 N. Y. Superior Ct. 555.
[3] N. Y. Weekly Supplement, 526.

action, or if he has not owned for six years previous to the time of instituting a suit, then he can recover for the trespasses committed between the time of his acquiring title and the beginning of the action.

In equity we have also seen the court will, as incidental relief to the remedy of an injunction, award past damages accruing within six years prior to the commencement of the action down *to the date of the trial.*[1] Suppose, however, that a little more than six years before beginning an action a property owner leases property, say for five years. Is he entitled to recover damages accruing during the pendency of the lease? It has been plausibly argued that to him it was a matter of complete indifference whether during this lease the road is in operation or not, that the cessation of the road would not make his rent a bit higher until his lease expired. It has also been argued that as long as the premises are in possession of a tenant, the landlord is not entitled to the possession and is not the proper person to sue for a trespass.

The first argument seems clearly fallacious. It proceeds on the assumption that the cause of action accrued more than six years before the action was commenced, and hence is barred under the Statute of Limitations. The truth is that the cause of action that accrued within six years was anticipated as likely to occur more than six years ago, so that it is only the anticipation that is barred, not the cause of action which was for trespasses committed within six years, although foreseen as likely more than six years previously, because they were a continuing trespass that had already been existing several years before the lease was made. And it was the fact of the certainty of these trespasses being committed these six years that fixed the rate of rent, not the fact they had been previously committed. The second argument is, however, a more serious one. Was the landlord the proper party to recover at all for the past trespasses? Ordinarily, when premises are in the possession of a tenant, the tenant, not the landlord, is the proper plaintiff to sue for a trespass to the realty, unless it be one affecting the inheritance. So that while the landlord could maintain an action in equity on the ground of restraining an injury to the inheritance, he could not recover the past damages. The Superior

[1] Glover *v.* Manhattan, 51 N. Y. Superior Ct., at p. 18.

Court in a second Mortimer case[1] have allowed a recovery of past damages by the landlord on the ingenious theory that the tenant is not in possession of these easements, because the landlord only leased to him what he himself was in possession of. A truer ground, if it could be reached without violating established principles, would be to award the damages to the landlord, because he, not the tenant, suffered them.

We come now to the question, of what date shall the damage be assessed, — a very important inquiry in view of the policy pursued by the management of the roads in New York City. If lots were vacant in 1878, when the elevated roads were put in operation, but now support costly structures, it is obvious the damage to-day may be much greater than it was in 1878. Of which date is it to be assessed? Can a person deliberately erect a building on a vacant lot, with an elevated road running by the lot, and then compel the court to include in the estimate of damages the injury to the building as well as to the lot? In many cases this difficulty is a more apparent than real one, for the real damage is the injury to the use of the lot, which perhaps would only be evidenced by the injury to the lot with a building upon it. In other words, the estimate of damages would be the same in either event. Still, there might be and are some cases where, as a vacant lot, the land was worth, say, $50,000 before the road, and would be worth $40,000 as a vacant lot to-day. Assuming there would have been no change in selling value but for the railroad, the damage to a vacant lot would be $10,000. We now take the same lot and put a building upon it; to-day it is worth $75,000. We prove that an identical building, on a parallel street, where lots were just as valuable as in the street in question before the road was built, is now selling for $95,000; that our building, were no road there, would presumably be worth $95,000 also. Is not the damage to our lot and building $20,000 now? In other words, can a property owner improve his land and then charge the trespasser with it? The case of Campbell *v.* Seaman[2] was the chief authority relied on by the property owner's counsel in the case of Kenkele *v.* Manhattan Railway Company.[3] The Kenkele case laid down the law to be that the damages must be assessed as of the time of the

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[1] 29 N. Y. St. R. 262.
[2] 63 N. Y. 568.
[3] 29 N. Y. State Reporter, 95.

trial, that the roads being trespasses could not invoke the rule of damages they might have had the benefit of had they acquired the property when they built their road. If this Kenkele case be affirmed at the Court of Appeals, it must result in compelling the railroads to pay an increased compensation for all the lots recently built on along their line in the upper part of Manhattan island. In the Kenkele case the court say that the sole question is what enhanced value these easements would give to the property to-day, for apart from the property to which they attach they are worthless.

In Tallman *v.* Metropolitan, decided by the Court of Appeals, April 15, 1890, it was held that a property owner has the right to make any reasonable use of his land, when not acting "wantonly," and can recover the damage done to his land *in the use to which it is put*, but that he cannot recover past damages to vacant lots, assessed on the theory that but for the road having come there he would have built upon them.

We have considered for what kind of damages a recovery may be had, who is entitled to the damages, and of what date they are to be assessed. There remains the single question, how to prove them. The building of the elevated roads in New York City shifted somewhat real-estate values. Add to the uncertainty in our problem the natural increase in values in some portions of the city from extraneous causes, and we find it a complicated problem to attain justice to all parties. Two late decisions of the Court of Appeals have introduced another disturbing feature.

In McGean *v.* Manhattan Railway Company [1] there is a dictum that testimony as to what the property would be worth to-day without the elevated road is incompetent if properly objected to, although in that particular case the judgment was not reversed, because it was held that there was abundant competent testimony to sustain the verdict of the jury. And yet that question was the very one the court or jury had to decide. Where property has had a rental value for years, it may be possible to get at the permanent damage to the fee without such testimony; but how are we to get any testimony that is not open to this objection when property has been improved since the road came? As the Kenkele opinion (*supra*) says, unless such testimony is competent

[1] 27 N. Y. State Reporter, 337.

the whole matter would be merely guess-work, and the plaintiff left without any means of proving his damage.

In the case of Newman *v.* Metropolitan Elevated Railway Co., decided by the second division of the Court of Appeals, March 4, 1890,[1] it was ruled that the defendants were entitled to offset against the damage any special benefit conferred upon the property in question by the maintenance of the road, the location of its stations, etc. A reference to the General Railroad Act of the State[2] and to the "Rapid Transit Act"[3] will show that they contain this provision, that Commissioners of Appraisal in fixing compensation shall not "make any allowance or deduction on account of any real or supposed benefit which the party in interest may derive from the construction of the proposed railway."

It is difficult to see how the decision in the Newman case is good law. The court rest their decision on the theory that it is for consequential damages that a recovery is permitted in most of these cases, and that it is only where property is actually taken that no offset of benefit is allowed. But the very idea at the bottom of all the elevated decisions in that court was that property had been taken. It is difficult to perceive why the second division have not overruled the first, or else shifted the ground of liability.

The Newman opinion also says that general benefits due to public improvements and the construction of railroads are not such as the companies are entitled to offset, and that the property owner is entitled to them.

The true rule of damages is certainly the difference between the value of the property without the road taking these easements and its value with them taken. If the rents have depreciated so much per year, and the court is of the conclusion that the decrease is attributable to the trespasses of the railroads, we have one method of reaching the fee damage by a proper capitalization. Suppose they have increased slightly, does it follow that there still may be no depreciation occasioned by the road? Perhaps the two parallel streets on the east and west have increased 25% more. May not the two increases be a direct benefit occasioned by the road itself, and can a property owner complain because his property has not

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[1] Probably 118 N. Y.

[2] Chapter 140 of the Laws of 1850.

[3] Chapter 606 of the Laws of 1875.

been benefited as much as other streets by these roads? Can the roads claim that property has not been damaged by them, though it may sell for its old figure, when all the neighborhood east and west, north and south, has shown a much higher increase? Does not a restriction on the use of property necessarily entail some damage? Is it a fair criterion to say that a sale for $23,000 in an inflated currency in 1873 is higher than a sale for $20,000 in currency on a gold basis in 1890? All these interesting questions I will only hint at as showing what a field of inquiry we have now touched. They are still unsettled questions which I do not feel justified in more than alluding to.

This very hasty glance at the elevated railroad litigation in New York will have served the writer's purpose, if it has helped in any way to show that, no matter how novel may be a legal problem, and no matter how great may be the interest involved, as long as the United States possess honest courts and a well-trained bar there will be found a way to meet all new problems and to reach satisfactory results; a way to promote public enterprise without injuring the individual citizen. This is the real benefit of the Story decision. This is the real lesson that it teaches. These are the two golden rules of jurisprudence it enunciated: First, "*Sic utere tuo ut alienum non lædas;*" and the second is like unto it, "Private property shall not be taken for public purposes without compensation."

Edward A. Hibbard.

NEW YORK, April, 1890.

TAXATION OF PIPES IN PUBLIC STREETS.

AN interesting question of law, and one upon which the courts are in hopeless disagreement, arises when a tax is levied upon iron pipes laid by private parties in the public streets by permission of the local authorities. Common examples of such pipes are gas and water mains laid by private corporations.

The fundamental inquiry is as to the nature of the interest of the corporation in the mains after they have been laid. Four theories have been held by the courts.